



DEPT. OF TRANSPORTATION
DOCKETS
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July 1, 2002

National Highway Traffic Safety Administration
Docket Management
400 Seventh Street, SW
Nassif Building, Room PL-401
Washington, DC 20590

RE: Docket NHTSA-02-12150 - 13

To Whom it May Concern:

The Tire Industry Association (TIA) is pleased to offer these comments to the proposed rules governing the submission of Confidential Business Information (CBI) to the National Highway Traffic Safety Administration (NHTSA): *Confidential Business Information Notice of Proposed Rulemaking* 67 Fed. Reg. 21198 (April 30, 2002) (NPRM). The International Tire & Rubber Association (ITRA) and the Tire Association of North America (TANA) have merged to form TIA. The new trade association represents over 4,000 businesses with members in all sectors of the tire industry. Our membership is comprised of tire dealers, wholesalers and distributors, manufacturers and retreaders, businesses that sell, service and recycle tire and rubber products, as well as companies that provide equipment and services for the tire industry. It is on their behalf that we submit these comments.

TIA is concerned that NHTSA's proposed rules are focused on administrative ease rather than on protecting confidential information. NHTSA has proposed categorically excluding data



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from protection. Worse yet, NHTSA has chosen to exclude one category of data – the early warning reporting requirements – that has yet to even be fully defined. NHTSA does this contrary to the express wishes of Congress. Furthermore, as a matter of sound policy, the blanket exceptions to confidentiality fail; the proposal will lead to less (rather than more) disclosure and provide the public with incomplete, inaccurate and misleading data.

Therefore, TIA urges NHTSA to provide CBI protection to all data submitted under the early warning requirements unless the Secretary of Transportation (“the Secretary”) specifically determines, on a case-by-case basis, that certain data is required to be disclosed. Additionally, for all other CBI submitted, TIA urges NHTSA to apply the categorical protections and otherwise continue the case-by-case determination.

A. Blanket Exceptions are Contrary to Privacy Law

NHTSA has expanded its existing concept of categorical CBI protection to categorical exclusion:

[T]he proposal would provide that the agency may determine that a class of information is presumed not to cause competitive harm if released. Pursuant to this proposed change to the regulation, the agency proposes to create a number of classes of information presumed not to cause competitive harm if disclosed.

NPRM, 67 Fed. Reg. at 21200. NHTSA indicated that it previously considered both past requests for CBI protection and also “the types of information it is likely to receive in the future.” *Id.* NHTSA determined that because it “consistently denies” certain types of requests for CBI, it could create categorical exclusions.



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For NHTSA to propose a categorical denial simply for administrative ease is contrary to established law that information that will result in competitive harm should not be published. Certainly, classes of information that *will* cause competitive harm are useful – they eliminate the need for submitters and NHTSA to engage in the process of determining what is confidential.

There are three narrow categories of data that are categorically treated as confidential: “blueprints and engineering drawings (under certain circumstances), future specific model plans, and future vehicle or equipment production or sales figures (in some cases, for limited periods of time).” NPRM, 67 Fed. Reg. at 21199-00. It is obvious that disclosure of this type of information is always going to cause competitive harm. *See, e.g., James T. O’Reilly, 1 Federal Information Disclosure* § 14:83 (3d ed. 2000) (listing common examples of information that if released, will cause substantial harm).

To create a category of information that is *never* going to cause competitive harm is technically impossible; to attempt to do so, a violation of the law. TIA strongly opposes such a blanket assumption and urges NHTSA to continue deciding what business information should be kept confidential on a case-by-case basis (except the early warning data which should be categorically protected as mandated by Congress). Only with a case-by-case determination will NHTSA properly balance the requirement to protect CBI with the public’s desire to obtain information (or more likely, a competitor’s desire to obtain useful information about another company).



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B. Early Warning Report System Regulation

Astonishingly, one of the categories of data subject to blanketed exclusion is the data that will be submitted as part of the Early Warning Reporting System, *once it is established*. Without the final Early Warning Reporting System regulations in place, it is impossible to know exactly who will be required to report information to NHTSA.

In previous comments to NHTSA on the proposed Early Warning Reporting System (NHTSA Docket 2001-8677), ITRA/TANA (now TIA), along with the Rubber Manufacturers Association (RMA) asked, "that original tread truck tire manufacturers and retreaders report *fatalities only* at this time." Not knowing the outcome of that request leaves us to assume for now that retreaders and possibly private brand owners will have to report everything included in the NPRM on the Early Warning Reporting System: fatalities, injuries, property damage claims, consumer complaints, warranty adjustments, and field reports. Our retread members and private brand owners remain concerned that if they are expected to report any of the information listed, it could cause double reporting of information if the original casing manufacturers also report.

As RMA has explained in its comments, Congress did not intend for the Early Warning data to be public information. "None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121." 49 U.S.C. § 30166(m)(4)(C). RMA's comments on this



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matter, which TIA fully endorses, demonstrate that the text and legislative history make clear that this provision is intended as a blanket *ban* on releasing information.

Furthermore, the NPRM makes clear that the exception to treating Early Warning data as CBI is based on administrative ease. The statute clearly requires the Secretary to make specified findings that the data should be released. Even if the Secretary could make such findings, and TIA does not believe he can make a blanket determination based on the nature of the data, he has not done so in the NPRM.

TIA notes that the Consumer Product Safety Commission (CPSC), which collects data about consumer complaints similar to the early warning data, provides strong protection for CBI. 15 U.S.C. § 2055(b)(5). Congress specifically amended the CPSC's statute to provide greater protection after the agency initially provided broad disclosure of CBI. *See O'Reilly, supra*, § 14:107 (discussing broad CBI protections of CPSC). Because the CPSC's consumer protection mandate is similar to NHTSA's under the TREAD Act, NHTSA should consider CPSC's protections for guidance.

C. Blanket Exclusions Will Result in Less, Not More Data

Courts recognize that agencies do not have to disclose information that is likely "to impair the Government's ability to obtain necessary information in the future." *Critical Mass Energy Project v. Nuclear Regulatory Com'n*, 975 F.2d 871 (D.C. Cir. 1992). "If the information cannot be protected, . . . a person is more likely to resist solicitation efforts by the government and to supply information reluctantly *even when compelled to do so by statute*."



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O'Reilly, *supra*, § 14:85, n.3 (quoting *Note, Developments under the Freedom of Information Act—1974*, 1975 Duke L.J. 416, 444 (1975)). This is exactly the situation here. Various entities will be required to submit information to NHTSA in the interest of protecting the public. Yet, if all of the information is disclosed, these entities will produce the bare minimum required. If, on the other hand, they know the information will be kept confidential, or even if they are allowed to request confidentiality, they will be more likely to provide robust amounts of data. “The agency [therefore] is more effective because it can keep this class of information confidential and, by doing so, will have an easier time of collecting similar data in the future from [all] submitters.” *Id.* § 14:85.

D. Massive Amounts of Raw Data to the Public Will Harm, Not Help Consumers

At a time when the Federal Government seeks to improve the quality of data, *see, e.g.*, Pub. L. No. 106-554, § 515 (2001) (requiring OMB to create regulations “ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies”), NHTSA is proposing the opposite. Applying a blanket exclusion to CBI would potentially release tremendous amounts of inaccurate data to the public. Furthermore, such data would be provided with no context or explanation. The TREAD Act was designed to allow NHTSA access to data so that *it* can evaluate trends in data to find safety problems. It was not intended to provide the public with tremendous amounts of raw data so that they can find trends in tire performance.



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TIA is concerned that if all of the information submitted to NHTSA is not classified as confidential, the general public might look at that information and make improper assumptions about the data. ITRA/TANA stated in our early warning comments:

While some consumers may have valid complaints, many times those complaints do not take into account abuse of a tire by a consumer or the actions of a dissatisfied consumer. Many tires fail due to severe driving conditions such as under-inflation, excessive speed, impact damage, not rotating tires, overloading, vehicle condition, and the failure of a tire to live up to its mileage warranty. Consumers see uneven treadwear on their tires but do not realize that can come from a misaligned car. Many small tire businesses will accept a warranty adjustment simply to keep their customers satisfied. Therefore, customer complaints and warranty claims information will not be an accurate way of determining if there is a real safety problem with a tire. Often times this data reflects the level of customer service a business offers its customers. If the government is going to expect reports on all claims and adjustments, many small dealers will be inclined not to make any, and customer satisfaction will decrease.

Keeping customer complaints and warranty adjustments confidential is important to the members of TIA. Most tires fail due to abuse by the consumer, not due to inherent flaws in the tire. If NHTSA requires the reporting of all customer complaints and adjustments and the public has access to that information, it may show patterns that are not truly representative of the safe, quality products the tire industry manufactures. Therefore TIA recommends that NHTSA keep customer complaints and warranty adjustments confidential unless proven by NHTSA to be a serious safety concern.

During Congressional hearings on implementation of the TREAD Act, it was noted that if the Early Warning Reporting System regulation were adopted as proposed, it would create the largest database in the federal government. NHTSA can certainly obtain the information it needs



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in order to make safety-related decisions without divulging all of this data to the public. There is no need to publish all the submitted data for consumers to misinterpret or trial lawyers to twist for their own means.

CONCLUSION

TIA respectfully urges NHTSA to recognize Congress's determination that the early warning data should receive blanket CBI protection unless the Secretary determines that specific data should be released. Furthermore, TIA believes that NHTSA should not adopt categorical exclusions because they are contrary to clearly established privacy law. Rather, NHTSA should make case-by-case determinations of whether release of the data would result in competitive harm (for compelled data) or is the type businesses usually keep confidential (for data voluntarily submitted). Doing so will provide the driving public with the information that they need to make informed choices and it will encourage increased reporting by industry.

We look forward to working with NHTSA on this proposal and if we can answer any questions please call us at 703-736-8082.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy Littlefield".

Roy Littlefield
Director of Federal and Legislative Affairs
Tire Industry Association

A handwritten signature in black ink, appearing to read "Becky MacDicken".

Becky MacDicken
Director of Government Affairs
Tire Industry Association